UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Barbara Andresen,

Plaintiff,

v.

Fuddruckers, Inc.,
a Texas corporation,

Defendant.

Civil No. 03-3294 (DWF/SRN)

MEMORANDUM OPINION AND ORDER

Julie A. Doherty, Esq. and Richard G. Jensen, Esq., Fabyanske Westra & Hart, 800 LaSalle Avenue, Suite 1900, Minneapolis, MN, 55402, counsel for Plaintiff.

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Introduction

The above-entitled matter came on for hearing before the undersigned United States District Court Judge on November 4, 2004, pursuant to Defendant Fuddruckers, Inc.'s ("Fuddruckers") Motion for Summary Judgment on All Counts of the Plaintiff's Complaint. In the Complaint, Plaintiff Barbara Andresen alleges employment discrimination in violation of the Americans with Disabilities Act ("ADA") and the Minnesota Human Rights Act ("MHRA").

For the reasons set forth below, Fuddruckers' motion is denied.

Background

Andresen worked at a Fuddruckers restaurant located in St. Louis Park, Minnesota for approximately 16 years before her employment was terminated in August 2002. Andresen alleges that she was fired because she stutters. Fuddruckers denies that it discriminated against Andresen and asserts that Andresen was fired for performance reasons and because she drooled and spit into food that she prepared and served to customers.

Andresen suffers from a lifelong stuttering disorder that she and at least one speech pathologist describe as severe.[1] According to Andresen, her stuttering disorder makes speaking difficult for her and often causes her frustration, stress and embarrassment. Andresen claims that people have difficulty understanding her and she is often unable to speak quickly enough for strangers or effectively on the telephone. Andresen sometimes avoids certain words or sounds when she speaks, as well as situations when she might have to speak with a stranger. In the past, Andresen has, in lieu of speaking, written things down or responded with nods or gestures. Andresen also claims that when she stutters, she experiences pauses during which she has difficulty breathing. When Andresen stutters, she also sometimes experiences excess build-up of saliva. Andresen claims that the build-up of saliva only

[1] A Speech Evaluation conducted by Kathleen E. Dauer, a speech pathologist who evaluated Andresen, indicates that Andresen exhibits stuttering behaviors that are moderate to severe in frequency and severe in tension. Dauer also indicated that Andresen suffers from a neural-oral-muscular discoordination problem. (*See* Affidavit of Richard Jensen in Support of Plaintiff's Opposition to Motion for Summary Judgment ("Jensen Aff."), ¶ 4, Ex. C, Deposition Transcript of Kathleen E. Dauer ("Dauer Depo.") at 9, Ex. 1 at 3.)

occurs when she stutters. Andresen claims that she corrects the build-up of saliva by swallowing frequently.[2]

Despite her stuttering, Andresen worked at Fuddruckers for approximately 16 years at various jobs, including as a preparatory cook, an expediter, a baker and a bartender. Andresen claims that the nature of the work she performed at Fuddruckers did not require her to talk any more than she was able to complete her tasks. There is nothing in Fuddruckers' records from the time Andresen started at Fuddruckers to late 2001 indicating that Andresen's stuttering or salivation issues were problematic or that they were the focus of any customer complaints.[3] Moreover, Andresen claims that up until 2001, she had received only good reviews. (*See* Jensen Aff., ¶2, Ex. A, Andresen Depo. at 168.) In fact, at least one associate manager at Fuddruckers stated in deposition testimony that Andresen got along with everyone, did not have any attendance problems and, for the most part, was willing to do whatever needed to be done. (*See* Jensen Aff., ¶6, Ex. E, Deposition Transcript of Kyle Barrie ("Barrie Depo.") at 23, 47.)

In the fall of 2001, Fuddruckers assigned two new managers, Eugene Selje and Douglas Neu, to the St. Louis Park restaurant. Fuddruckers claims that it did so to improve a poor public image that was the result of unsanitary conditions. According to Andresen, after the new managers took over, they began to find performance issues with Andresen, claiming for example that Andresen incorrectly prepared lettuce for the salad, improperly placed tomato slices in the salad bar, did not complete work

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[2] That Andresen swallows to eliminate the build-up of saliva is consistent with the testimony of Kathleen E. Dauer. (*See* Jensen Aff., ¶ 4, Ex. C, Dauer Depo. at 10.)

[3] There is evidence that during this time period a customer complained because Andresen coughed into her hand and continued to work with food without washing her hands.

within the allotted time allowed, failed to plug in the cheese pot, and removed notices posted by management. In January of 2002, Andresen claims that she overheard Selje tell an associate manager that Selje was "going to find a way to get rid of Barb." (*See* Jensen Aff., ¶ 2, Ex. A, Andresen Depo. at 125-28; ¶ 3, Ex. B, Andresen Depo. at 243.)

Fuddruckers, on the other hand, contends that the new managers, in an effort to implement new guidelines and procedures, noticed that Andresen resisted these new procedures and appeared to "milk the clock." (*See* Affidavit of Robin Lesses Ellis, ¶ 4, Ex. 2, Deposition Transcript of Kyle Barrie at 37; ¶ 7, Ex. 5, Deposition Transcript of Eugene Selje at 74.) Fuddruckers also claims that in addition to performance deficiencies, Andresen has an issue with excessive salivation. Fuddruckers claims that Andresen spit or drooled into food on several occasions and coughed into her hand and continued to work with food without washing her hands on another occasion. Fuddruckers also contends that it received at least three customer complaints about Andresen's excessive salivation issue and that co-workers and supervisors witnessed Andresen drooling into food.

Andresen alleges that in 2002 she began to experience significant attacks on her employment status at Fuddruckers. For example, in May 2002, Fuddruckers instituted an "Action Plan" that Fuddruckers claims was designed to resolve Andresen's performance issues. Pursuant to the Action Plan, Andresen was required to correct certain performance deficiencies by June 6, 2004. The Action Plan provided the following: "Due to your problem of over-salivation and possible contamination of food, you will wear a protective (surgical type) mask at all time when working with food." (*See* Jensen Aff., ¶ 11, Ex. J. ("Action Plan").) Andresen disagreed with the need to wear the mask to prevent food contamination, but claims that she wore the mask as required. The Action Plan also required Andresen

to begin work at 7:30 a.m., to complete food preparation by 11:00 a.m., and to clean up between 11:00 a.m. and 11:30 a.m.[4] *Id*. Plaintiff asserts that there is evidence in the record indicating that Andresen should have been given more time to perform her work. (*See* Jensen Aff., ¶9, Ex. H., Deposition Transcript of Robyn Wait ("Wait Depo.") at 104.) Andresen claims that she was instructed to remove her mask during cleanup and that the general manager told her that he did not want customers to see her wearing the mask. (*See* Jensen Aff., ¶ 2, Ex. A., Andresen Depo. at 147.) Fuddruckers contends that Andresen failed to wear her mask at required times and submitted several affidavits to that effect. In June, Fuddruckers issued a memorandum to Andresen setting forth the continued conditions of her employment, while indicating that Andresen was failing to follow certain requirements of the Action Plan.

Fuddruckers terminated Andresen on August 1, 2002. Andresen claims that when she was terminated she was told it was because she was not preparing lettuce for the salad correctly. Fuddruckers' human resources department indicated that Andresen was fired for failing to complete job duties.[5] Andresen's termination notice states that Andresen was terminated because "performance has not improved to a (sic) acceptable level." (*See* Jensen Aff., ¶12, Ex. K ("Termination Notice").) There is nothing in Andresen's Termination Notice indicating that she was terminated for drooling into food. (*See id.*)

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[4] This constituted a reduction in Andresen's hours.

[5] Fuddruckers obtained several statements from co-workers indicating that Andresen did not perform certain tasks, such as slicing vegetables or filling ketchup containers, correctly. However, these affidavits were obtained after Andresen was terminated.

In its moving papers, Fuddruckers asserts that it terminated Andresen "because she drooled and spit into food that she prepared and served to customers." (Memorandum in Support of Fuddruckers, Inc.'s Motion for Summary Judgment on All Counts of the Plaintiff's Complaint at 1.)[6] Fuddruckers also contends that Andresen failed to meet performance standards and specifically that Andresen failed to wear the mask as required.

Andresen contends that it was not until after Fuddruckers learned that she was pursuing a discrimination claim that it asserted that it terminated her because of an overactive-salivary gland. Instead, Andresen asserts that she was terminated because she stutters. In support of this assertion, Andresen points to a statement dated February 25, 2003, wherein Selje explained in part that "[w]e did not want Barb interacting with the guest [sic] because she had a speech impediment as well as her salivation issue." (*See* Jensen Aff., ¶13, Ex. L. at 2). In the same statement, Selje also claimed that Andresen was "combative from the start. Anything that I pointed out needed to be done she would argue with me . . . ." *Id*. In addition, when asked what his concern was with Andresen being able to converse with guests, Lee Bushman, the general manager for the St. Louis Park restaurant, testified: "Whether they would be able to understand her or not." (*See* Jensen Aff., ¶10, Ex. I, Deposition Transcript of Lee Bushman ("Bushman Depo.") at 116).

At several points during her tenure at Fuddruckers, Andresen requested that Fuddruckers work with her to allow her to keep her job and to maintain full-time hours. For example, on several

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[6] Fuddruckers has submitted several affidavits and cited deposition testimony in support of its contention that Andresen repeatedly drooled into food. Andresen challenges the veracity of this evidence and denies that she drooled into food.

occasions, Andresen claims to have asked management what other jobs that did not involve food preparation might be available, but Fuddruckers did not allow Andresen to perform any other jobs that did not require food preparation or contact with customers, such as bussing or washing dishes. When asked whether there was any work that would allow Andresen to retain her regular hours, Selje testified, "I don't believe that we had anything available." (*See* Jensen Aff., ¶ 7, Ex. F, Deposition Transcript of Eugene Selje ("Selje Depo.") at 68.) Andresen claims that during the period of time in which she was requesting to be given a different job at Fuddruckers, she witnessed employees who were hired for various positions she could have filled.

Andresen filed this action alleging employment discrimination in violation of the ADA and MHRA. Fuddruckers denies any discrimination and has moved for summary judgment on all counts of Andresen's Complaint.

Discussion

1. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The Court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *See Enterprise Bank v. Magna Bank of Missouri*, 92 F.3d 743, 747 (8th Cir. 1996). However, as the Supreme Court has stated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Fed. R. Civ. p. 1; *Celotex Corp. v. Catrett*, 477 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Enterprise Bank*, 92 F.3d at 747. The nonmoving part must demonstrate the existence of specific facts in the record which create a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Krenik*, 47 F.3d at 957.

II. Andresen's ADA Claim[7]

The ADA protects any "qualified individual with a disability." *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1023 (8th Cir. 2002), *quoting* 42 U.S.C. § 12112(a). In order to establish a prima facie case of discrimination under the ADA, Andresen must show that: (1) she has a disability within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) she suffered an adverse employment action because of the disability. *See Philip*, 328 F.3d at 1023; *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999). The employer must then rebut the presumption of discrimination "by articulating a legitimate, non-discriminatory reason for the adverse employment action." *Kiel*, 169 F.3d at 1135. If the employer does this, then "the burden of production shifts back to the plaintiff to demonstrate that the

[7] The MHRA parallels the ADA and thus Andresen's MHRA claim can be treated as co-extensive with her ADA claim. *See Fenney v. Dakota, Minn. & Eastern R.R. Co.*, 327 F.3d 707, 711 n. 5. (8th Cir. 2003); *Roberts v. KinderCare Learning Ctrs., Inc.*, 86 F.3d 844, 846 n. 2 (8th Cir. 1996).

employer's non-discriminatory reason is pretextual." *Id.* The proof necessary for discrimination cases is flexible and varies with the specific facts of each case. *See Philip*, 328 F.3d at 1023.

Fuddruckers asserts that Andresen cannot establish a prima facie case of disability discrimination because she is not disabled within the meaning of either the ADA or the MHRA, she was not qualified to perform the essential functions of her job, and she was not terminated because of her alleged disability. Moreover, Fuddruckers claims that Andresen was a direct threat to the health and safety of others at Fuddruckers.

A. Disability

To be considered disabled under the ADA, a person must: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) be regarded as having such an impairment. *See* 42 U.S.C. § 12102(2).[8] A person is "substantially limited" by his or her impairment if the impairment "prevents or severely restricts" the individual's ability to perform a major life activity. *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *see also Fenney*, 327 F.3d at 714-715. Major life activities include speaking, hearing, learning, caring for oneself, performing manual tasks, walking, seeing, breathing and working. *See* 29 C.F.R. § 1630.2(i). The factors considered in determining whether a person is substantially limited in a major life activity include: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long term impact. *See* 29 C.F.R. § 1630.2(j)(2)(i)-(iii).

[8] While the MHRA requires a material limitation rather than a substantial limitation on a major life activity, the Eighth Circuit has determined that this is merely a semantic difference. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 912 n. 4 (8th Cir. 1999).

Andresen has proffered sufficient evidence to create a genuine issue of fact as to whether her stuttering constitutes a "disability" under the ADA. First, there is no dispute that speaking is a major life activity under the ADA. Second, Andresen has stated that her stuttering has caused her significant problems with communication throughout her life and she has submitted evidence indicating that her stuttering has significantly impacted her life activities. For example, Andresen claims that she avoids situations in which she is required to converse with others; when she does speak, there are times where she cannot get her point across. In addition, managers at Fuddruckers' also acknowledged the impact Andresen's stuttering had on her ability to communicate, testifying that customers sometimes had a hard time understanding Andresen, at times Andresen could not get her point across, and that they did not want Andresen interacting with customers because of her stuttering. (*See* Jensen Aff., ¶ 6, Ex. E, Barrie Depo. at 28; ¶10, Ex. I, Bushman Depo. at 116.) Third, Kathleen Dauer, a speech pathologist who evaluated Andresen, stated that Andresen's stuttering is of a severe form which substantially limits her oral communication. Specifically, Dauer opined that Andresen's stuttering behaviors "are typical of a severe stuttering disorder." (*See* Jensen Aff., ¶ 4, Ex. C, Dauer Depo. at 9, Ex. 1 at 3.)

Fuddruckers asserts that Andresen's stuttering and overactive salivary gland do not substantially limit her ability to speak and therefore she is not disabled under the ADA.[9] For example, Fuddruckers asserts that Andresen has been gainfully employed for years, has held numerous jobs inside and outside of the restaurant industry, and is able to verbally communicate in her everyday life.

[9] Fuddruckers also asserts that Andresen's stuttering and overactive salivary gland do not substantially limit her ability to breath and work. Because Andresen is not claiming that her stuttering has substantially limited her ability to breath or work, the Court will not consider these arguments.

While the Court acknowledges that there is evidence in the record that may ultimately lead a fact-finder to conclude that Andresen is not substantially limited in her ability to speak, for purposes of the motion before it, the Court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to Andresen. In addition, the Court does not agree with the premise that Andresen's stuttering is of small consequence to her life or the suggestion that one must be mute or incapacitated to be substantially limited in speaking. (*See* Memorandum in Support of Summary Judgment at 15; Reply Memorandum in Support of Summary Judgment at 4.)

The case law cited by Fuddruckers wherein previous courts have dealt with the issue of stuttering in the context of the ADA does not persuade the Court that Andresen's stuttering cannot, as a matter of law, constitute a disability. In fact, at least one case, *Zhong v. Tallahatchi General Hosp. & Extended Care Facility*, 1999 WL 33227442 (September 28, 1999, N.D. Miss.), supports the idea that stuttering, if substantially limiting, can constitute a disability under the ADA. In *Zhong*, the plaintiff's ADA claim was dismissed on summary judgment after the plaintiff testified during a deposition that his stuttering "was very mild, very, very mild. Only occasionally, I stutter. Some of the people, they have talked to me for one time, he or she maybe not notice." *Zhong*, 1999 WL 33227442 at *3.[10]

[10] Defendant also cites to *Preacely v. Schulte Roth & Zabel*, 2001 WL 1001181 (August 29, 2001 2nd Cir.). In *Preacely*, the plaintiff admitted that his stutter was not a disability and that it did not interfere with his ability to work or talk. *See Preacely*, 2001 WL 1001181 at * 2. The Second Circuit Court of Appeals, therefore, affirmed the district court's grant of summary judgment for the employer. *See id.*

Such is not the case here. Andresen has submitted evidence sufficient to create a genuine issue of fact that her stuttering is severe and that it substantially limits her ability to speak, and therefore a genuine issue of fact exists regarding whether her stuttering constitutes a "disability" under the ADA.[11]

B. Qualified to Do the Job

To state a claim under the ADA, Andresen must "possess the requisite skill, education, experience, and training for her position; and [] be able to perform the essential job functions, with or without reasonable accommodation." *Heaser v. Toro Co.*, 247 F.3d 826, 830 (8th Cir. 2001). Under both the ADA and the MHRA, an employer must reasonably accommodate an employee's disability unless it can demonstrate that the accommodation would impose an undue hardship on the employer. *See* 42 U.S.C. § 12112(b)(5)(A).

Fuddruckers claims that Andresen was not qualified to handle food as part of her job. Moreover, Fuddruckers claims that Andresen failed to wear a mask at all required times and without the mask, could not perform the essential job functions of a preparatory cook because she spit and drooled in the food. Andresen denies that she was not qualified and asserts that she wore the mask at all required times.

Andresen has submitted evidence to demonstrate she was qualified to do her job at Fuddruckers. Specifically, Andresen performed her duties for more than 15 years at Fuddruckers

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[11] Andresen also asserts that Fuddruckers regarded her as disabled. Because the Court finds a triable issue of fact as to whether Andresen was actually disabled, we need not reach her "regarded as" claim.

without any documented indication showing otherwise. Andresen has submitted evidence that despite her difficulties in speaking, the nature of her job was such that she did not need to talk any more than she was able to perform her tasks as a preparatory cook. Even if Andresen could not continue her duties in food preparation, she requested that Fuddruckers accommodate her disability by asking to do any other work in the restaurant so as not to lose her job. Fuddruckers contends that Andresen could not perform the essential functions of her job with or without an accommodation.

Andresen is only obligated to make a facial showing that a reasonable accommodation is possible and the burden then shifts to the employer to show that it could not make the accommodation. *See Fjellstad v. Pizza Hut of Am.*, 188 F.3d 944, 950 (8th Cir. 1999) (holding that reassignment to a vacant position is a possible accommodation under the ADA). Here, Andresen has made a facial showing that Fuddruckers could have reassigned her to another position, such as busing or washing dishes, and Fuddruckers has not rebutted that showing by demonstrating that it was unable to make such an accommodation. Accordingly, viewing the evidence and drawing inferences in the light most favorable to the Andresen, the Court finds that a triable issue of fact exists as to whether Andresen was qualified to do her job at Fuddruckers.

C. Adverse Employment Action Because of Disability

In order to overcome her initial burden of establishing a prima facie case, Andresen must also demonstrate that she suffered an adverse employment action. *See Fenney*, 327 F.3d at 716. An adverse employment action is one that causes a material change in the terms or condition of employment. *Id.* Andresen was terminated by Fuddruckers and, prior to that had her hours reduced. Fuddruckers does not dispute these facts. Instead, it argues that Andresen was fired for other, non-

discriminatory reasons and that there is no evidence in the record that Andresen was fired because she stuttered. Specifically, Fuddruckers asserts that it terminated Andresen because she drooled and spit in food and as a result, she presented a health hazard.

Andresen has produced sufficient evidence that she was terminated because of her stuttering to survive summary judgment. Specifically, there is no evidence in the record that at the time of Andresen's termination, Fuddruckers was firing her for drooling into food. For example, Andresen claims she was told she was being fired because she was not preparing the salad lettuce properly and Andresen's Termination Notice makes no mention of drooling on the part of Andresen. Moreover, Andresen has submitted evidence that Fuddruckers did not want her interacting with guests because of her speech impediment. Viewing the evidence and drawing inferences in the light most favorable to the Andresen, the Court finds that Andresen has submitted evidence sufficient to create a triable issue of fact as to whether she was terminated because of her stuttering.

D. Legitimate, Nondiscriminatory Reason

Once a plaintiff establishes a prima facie case of discrimination under the ADA, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. *See Kiel*, 169 F.3d 1134-35. The burden then shifts back to the plaintiff to show that the proffered reason was a pretext or that discrimination was a motivating factor for the adverse employment decision. *See Ordahl v. Forward Tech. Indus., Inc.*, 301 F. Supp. 2d 1022, 1029 (D. Minn. 2004) (Tunheim, J.).[12]

[12] Whether or not the decision of the United States Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), altered the traditional third step of the burden-shifting analysis, the result of this case remains the same. Andresen has submitted sufficient evidence to create a genuine issue of material fact that Fuddruckers' proffered reason for terminating her employment was a pretext and that

Fuddruckers asserts that it fired Andresen for drooling in food and for failing to meet performance standards. However, Andresen has presented sufficient evidence such that a reasonable jury could conclude that Fuddruckers fired Andresen because she stuttered or that her stuttering was a motivating factor. Therefore, the Court finds that Andresen has met her burden and denies Fuddruckers' motion for summary judgment.

E. Direct Threat to Health and Safety

Fuddruckers also asserts that Andresen posed a direct threat to the health and safety of others in the workplace. The ADA allows employers to require that a disabled person not pose a "direct threat to the health and safety of other individuals in the workplace." 42 U.S.C.A. § 12113(b). A "direct threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C.A. § 12111(3). Fuddruckers claims that Andresen drooled into food served at the restaurant and refused to take any action to eliminate this threat. Fuddruckers also claims that Andresen refused to wear a mask at all required times. In addition, Fuddruckers argues that continuing to employ Andresen would have jeopardized the health of its patrons in violation of Minnesota's Food Code. *See* MN Food Code, Minn. R. § 4626.0110 2-401.12 (2004).[13]

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discrimination was a motivating factor.

[13] This section reads as follows: "A food employee experiencing persistent sneezing, coughing, or a runny nose that causes discharges from the eyes, nose, or mouth shall not work with exposed food;

Under the ADA, the argument that an employee is a direct threat is an affirmative defense to liability. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002). As such, it must be pled under Rule 8(c) of the Federal Rules of Civil Procedure. Because Fuddruckers failed to plead its "direct threat" affirmative defense, it has been waived.[14] Even if Fuddruckers could properly assert its "direct threat" affirmative defense, the Court finds that Fuddruckers has failed to meet its burden demonstrating that it is entitled to summary judgment on this defense. Fuddruckers bases its defense on contested facts; namely, that Andresen drooled or spit into food. In addition, genuine issues of material fact exist as to whether Andresen failed to wear the mask while working with food. Accordingly, Fuddruckers' motion for summary judgment is denied.

Based on the files, records, and proceedings herein, and for the reasons set forth above, **IT IS HEREBY ORDERED** that:

1. Defendant Fuddruckers, Inc.'s Motion for Summary Judgment on All Counts of the Plaintiff's Complaint (Doc. No. 21) is **DENIED**.

Dated: December 14, 2004

s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court

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clean equipment, utensils, and linens; or unwrapped single-service or single-use articles." *See* MN Food Code, Minn. R. § 4626.0110 2-401.12 (2004).

[14] Fuddruckers did reserve the right to assert additional affirmative defenses in its answer, but never amended its answer to assert the "direct threat" affirmative defense.